

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

STAFF SUMMARY REPORT (Bill Johnson)
MEETING DATE: November 16, 2005

ITEM: 10

SUBJECT: **Proposed Amendment to the Water Quality Control Plan (Basin Plan) for the San Francisco Bay Region to Establish a Water Quality Attainment Strategy, Total Maximum Daily Load, and Implementation Plan for Diazinon and Pesticide-Related Toxicity in Urban Creeks - Hearing to Consider Adoption of Proposed Basin Plan Amendment**

CHRONOLOGY: January 2001 - Status Report, including draft problem statement and source analysis
September 2002 - Preliminary Project Report
March 2004 - Final Project Report
October 2005 - Hearing to Receive Testimony on Proposed Basin Plan Amendment

DISCUSSION: This is the second step of a two-step hearing process to establish a Water Quality Attainment Strategy (Strategy) for diazinon and pesticide-related toxicity in the Region's urban creeks. At this hearing, the Board will consider action on a Resolution (Appendix A) that would adopt a Basin Plan Amendment (attached to the Resolution), which would establish the Strategy. The Staff Report (Appendix B) and the Responses to Comments (Appendix C) contain supporting documentation. The Responses to Comments addresses public testimony and issues the Board raised at the October 19, 2005 hearing (Appendix D) and all written comments submitted during the public comment period, which ended September 19, 2005 (Appendix E).

Since the October hearing, we changed the Basin Plan Amendment and Staff Report, where appropriate, in response to particular comments. The changes, which are called out explicitly in the Responses to Comments, are consistent with the general purpose of, and approach to, the proposed Basin Plan Amendment, and are logical outgrowths of the evidence, testimony, and comments received. These changes are also shown in the version of the proposed Basin Plan Amendment attached as Appendix F. Testimony at this hearing will be limited to comments on these changes.

Strategy Overview

The Strategy is an implementation program to achieve and maintain existing water quality objectives relative to pesticides. The Strategy also serves as a TMDL for the Region's urban creeks. The federal Clean Water Act and California Water Code authorize the Board to establish the Strategy and TMDL. The Strategy includes all TMDL elements, including problem statement, source assessment, numeric targets, linkage analysis, and allocations.

The Strategy is needed because some uses of pesticides result in runoff that discharges into urban creeks. Pesticides in creeks can be toxic to organisms that live in creeks, and when creek water and sediment are toxic, the creeks do not meet

water quality standards. Because all the Region's urban creeks can be reasonably assumed to receive pesticide discharges, and because implementation actions will be most efficient if applied consistently and region-wide, we propose to apply the Strategy to all the Region's urban creeks.

The Strategy reflects the fact that many parties bear responsibility for pesticide discharges to urban creeks. Several agencies oversee pesticide use and pesticide discharges, but gaps in pesticide regulatory program implementation allow pesticides to be used in ways that result in discharges that impair urban creeks. The Region's urban runoff management agencies and others are responsible for urban runoff discharges through NPDES permits, but California law prohibits these agencies from regulating the use of pesticides other than their own within their jurisdictions. The Strategy includes actions that focus on (1) proactive regulation, (2) education and outreach, and (3) research and monitoring. It requires urban runoff management agencies to minimize their own pesticide use, conduct outreach to others, and lead monitoring efforts. It asks pesticide and water quality regulators to better coordinate their programs to protect water quality.

Public Process

The Strategy reflects a lengthy stakeholder process, which culminated in the recent formal opportunity for oral and written comments. The Responses to Comments addresses public comments and issues the Board raised during the October hearing. The following topics were of widest concern.

- Legal Basis for Strategy and TMDL. Some commenters asked for clarification regarding the Board's authority to adopt a water quality attainment strategy and a TMDL simultaneously. The Water Board's authority for adopting the proposed Basin Plan Amendment (which would establish the water quality attainment strategy and TMDL) comes from both the California Water Code (§ 13242) and the federal Clean Water Act (§ 303[d]). We believe calling this project a "water quality attainment strategy," and not just a "TMDL" best reflects the essential nature of the project.
- Recommended Agency Actions. A common concern relates to the Board's ability to oversee the actions of other federal and state agencies. We cannot require these agencies to implement the actions identified for them in the Strategy. However, California law directs the Board to describe actions necessary to achieve water quality standards, including recommendations for public and private entities. In the Basin Plan Amendment, we signal these recommendations by using the word "should." In this way, the Board provides leadership and clearly calls on our sister agencies to act.
- Water Board Authority and Federal Preemption. Several individuals asked for more clarity regarding the actions the Water Board can take when relying solely on its own authorities to control pesticide-related discharges. The Water Board has jurisdiction over actual and threatened pesticide discharges. The federal Clean Water Act requires permits for urban runoff discharges. California law limits the ability of local agencies to regulate pesticide sales and use. Some have argued that the federal Clean Water Act preempts this California law, but our analysis concludes otherwise.

- *Limits on Urban Runoff Management Agency Actions.* Various stakeholders expressed preferences for and against placing numeric effluent limits in storm water permits. In keeping with existing practice, we do not propose numeric effluent limits at this time. Some also expressed concern that we inappropriately limit the responsibilities of urban runoff management agencies. In our view, we do not provide a so-called “shield.” The Basin Plan Amendment states, “Requirements in each NPDES permit issued or reissued and applicable for the term of the permit shall be based on an updated assessment of control measures intended to reduce pesticides in urban runoff.”
- *Implementation Detail and Timeline.* Various individuals asked that the Basin Plan Amendment contain more detail regarding actions to be taken by the Water Board and others. Some have asked for a clearer timeline for strategy implementation. We have changed the Basin Plan Amendment to be clearer regarding our timeline for implementing actions within the Water Board’s direct control. We believe the proposed Basin Plan Amendment strikes the right balance between providing specific guidance and direction, and allowing sufficient flexibility to implement water quality standards effectively and efficiently. The revisions include a new table that commits the Water Board to implement specific trackable actions.

Early Implementation

The Water Board and many other parties have initiated efforts to confront the pesticide-related toxicity problem. Through the Board’s ongoing programs and existing authorities, we have joined with others to encourage the U.S. Environmental Protection Agency to ensure that its pesticide registration process protects urban water quality. We have collaborated with the California Department of Pesticide Regulation to develop a framework to eliminate and prevent pesticide-related threats to water quality. We have met with County Agricultural Commissioners and the Structural Pest Control Board to share our water quality concerns and identify proper roles for responding to these problems. We have also enhanced the pesticide-related provisions of recently adopted NPDES storm water permits to include measures similar to those identified in the Strategy.

The proposed Strategy is unprecedented. To our knowledge, no other region of the country has invested more effort in understanding how urban pesticide use impacts urban water quality and in developing a comprehensive Strategy to address urban pesticide-related water quality problems. Adoption of the proposed Basin Plan Amendment would provide the Board’s formal endorsement of our leadership in this area.

RECOMMEN- Adopt the Basin Plan Amendment
DATION:

- APPENDICES:
- A. Resolution, with Basin Plan Amendment (Exhibit A)
 - B. Staff Report, with Basin Plan Amendment (Appendix A) (November 9, 2005)
 - C. Responses to Comments (November 9, 2005)
 - D. Hearing Transcript (October 19, 2005)
 - E. Comment Letters (September 19, 2005)
 - F. Basin Plan Amendment, showing changes since October hearing